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C O N F I D E N T I A L SECTION 01 OF 02 VIENNA 001036

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TAGS: [CVIS](#) [KCRM](#) [PTER](#) [EUN](#) [AU](#)  
SUBJECT: DHS-EUROPEAN COMMISSION MEETING IN VIENNA ON  
VWP-RELATED AGREEMENTS

Classified By: Econ/Pol Counselor Dean Yap. Reason: 1.4(b)

Summary

1. (C) DHS A/S for Policy Stewart Baker and European Commission (EC) Justice DG Jonathan Faull, meeting in Vienna July 17, agreed on various steps to advance further U.S.-EU (and U.S.-EU member state) negotiations on the Visa Waiver Program (VWP) MoU and related data exchange agreements. Faull believed the immediate issue of sharing information could be resolved by categorizing it as "national security-related data," which falls outside the EU Commission's competence, as set out in a letter from Commissioner Barrot to Secretary Chertoff. However, sharing of data on border crossings and asylum applications, as DHS had proposed, required more work with member states. A/S Baker pushed for faster action on these items, notably for sharing data from the EU's Eurodac and SIS data bases, noting that sharing the information would result in fighting asylum fraud and terrorist travel and thereby bring benefits to people in both the U.S. and EU. Regarding the HLCG discussion on data protection, Baker and Faull agreed that the two sides should work to develop information on how the two sides' regimes, despite different legal foundations, had much the same practical effect. End Summary.

Sharing of EU Data

2. (C) DG Faull reported that at a recent meeting of the EU's JHA Council, most EU member states objected to a pilot project on exchanging data from the EU's SIS and Eurodac data bases. Faull acknowledged that this may have reflected unfamiliarity with the idea, and affirmed that the EC would not abandon the idea. He wondered if the establishment of working Groups to look at the idea in more detail would be helpful. Referring to a recent letter from Commissioner Barrot to Secretary Chertoff, Faull emphasized that the EU's objective now was to resolve immediate problems related to VWP eligibility. He saw the SIS and Eurodac issue as a mid-term project, but asked if the U.S. priority was, as he understood, on national security-related data. He reported that, at their last meeting with COREPER, Barrot and he had told the Council that this was the case. Moreover he had said that the exchange of national security information was not a matter of EU competence -- national intelligence authorities were free to exchange information through their established channels while, at the same time, providing that information to the Schengen data bases. This, Faull thought, would resolve the immediate issue of U.S. access to EU member state data.

3. (C) Baker acknowledged this as an option, and underscored USG preference for HSPD-6 agreements, but pointed out that such channel were not normally used to share data on asylum fraud, for example. Faull asked that the U.S. understand the strains the Schengen system has already imposed on new and old EU member states. He noted that many members, for

example, were very concerned about sharing data with one another, and that U.S. requests for more comprehensive exchanges, though understandable, required time. While these were being prepared, he emphasized the U.S. should resolve its immediate concerns. In response to a question, Faull affirmed that there was no obstacle to sharing exit/entry data via intelligence channels.

¶4. (C) Baker and Faull discussed at length the legal regime surrounding SIS and Eurodac data. Faull generally accepted the utility of sharing such data from a law enforcement perspective, but emphasized that providing it from the EU databases themselves, or providing the data from national databases for other than asylum adjudication purposes was not legal. Changes to the EU statute are being considered to allow the data's use for law enforcement purposes; further amendments would be necessary if the data were to be shared outside the EU. Whether the nations that collect the data could share it would depend on the exact structure of their national databases and national legislation.

¶5. (C) Faull asked whether the U.S.-EC track on VWP membership could be concluded by an exchange of letters, rather than the U.S.-EC agreement Commissioner Barrot mentioned in his letter. Baker said he would consider the proposal and affirmed his belief that the two sides had resolved most of the issues Barrot wrote should be considered resolved. Baker also stated DHS did not intend to delay EU member states' VWP accessions due to lack of progress on the EC track; each EU member state would be judged on its own merits. Faull appeared reassured. Baker also pointed out that the U.S. might like to see increased cooperation on

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repatriation. Faull agreed on the need for U.S.-EU cooperation on third country repatriation challenges and in multilateral fora; Baker concurred.

VWP Review  
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¶6. (C) Baker and Faull briefly discussed the biennial review of VWP states. Baker reported that countries with a major overstay problem could face a loss of status in the program. Baker also confirmed that, beyond the VWP MoU and the two implementing agreements (HSPD-6 and Pruem-like), the U.S. had no further plans to seek additional data exchange from new VWP countries.

Data Privacy  
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¶7. (C) Acknowledging that the idea of extending the U.S. Privacy Act to non-citizens was unrealistic and probably unhelpful, Faull noted that the heart of the problem in the EU has been the belief that the U.S. does not give the same protection to others as it does to its own citizens. If a paper could be developed that shows that U.S. practice has comparable effect, it would help move the debate in Europe forward, he suggested. Baker wondered if a joint paper, showing how EU law is limited and explaining non-citizen's rights under U.S. law, might be a better approach. Faull agreed to explore the idea.

¶8. (C) Baker asked about the prospect of concluding work on data privacy in the HLCG in 2008, and registering the conclusions by an exchange of letters. Faull thought that might be possible, though the European Parliament was expecting an agreement and the EC would have to work closely with it.

PNR Review  
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¶9. (C) Faull and Baker discussed possible modalities for the periodic review spelled out in the 2007 U.S.-EU PNR

agreement. They agreed that the process should be reciprocal and include a balance between technical and policy expertise.

¶10. (U) A/S Baker has cleared this message.  
Girard-diCarlo